

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
MINNESOTA METAL FINISHING, INC.,) **Docket No. RCRA-05-2005-0013**
)
Respondent)

**ORDER DENYING RESPONDENT'S
MOTION FOR ACCELERATED DECISION**

I. Background

This action was initiated on August 26, 2005, by the filing of a five count Administrative Complaint and Compliance Order charging Respondent, Minnesota Metal Finishing, Inc., with violating the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. §§ 6901 *et seq.* and certain Federal and State regulations promulgated to implement RCRA, codified as 40 C.F.R. Parts 260 through 279 and Minn. R. 7045.0292, and 7045.0450 through 7045.0551. The Complaint asserts that Respondent owns and operates a facility in Minneapolis, Minnesota which generates, treats, stores and disposes of hazardous waste. In regard thereto, the Complaint alleges, in brief, that Respondent failed to: (1) adequately train certain of its employees, as well as maintain records of such training, employee job titles, and job descriptions in violation of Minn. R. 7045.0454, Subparts 1, 2, 3, 5, 6.A-6.C (40 C.F.R. §§ 264.16(a)(1)-(3), (b), ©, (d)(1)-(d)(3)) (Count 1); (2) include in its facility's Contingency Plan at all required times an evacuation plan, a named Primary Emergency Coordinator, identification of emergency equipment capability, and obtain the agreement to such Plan from local emergency response officials, in violation of Minn. R. 7045.0466, Subpart 4.C-F (40 C.F.R. §§ 264.52(c)-(f)) (Count 2); (3) maintain and operate its facility to minimize the possibility of fire, explosion, or any unplanned release of hazardous waste in violation of Minn. R. 7045.0462, Subparts 1.G and 2 (40 C.F.R. §§ 262.34(a)(4) and 264.31) (Count 3); (4) provide its employees with immediate access to an internal alarm or emergency communication device in violation of Minn. R. 7045.0462, Subparts 3B and 5 (40 C.F.R. §§ 264.32(b) and 264.34(a) (Count 4); and (5) obtain a permit from Federal or State authorities for the storage of hazardous waste in violation of Minn. R. 7001.0030 and 7001.0520, Subpart a.A (Count 5). The Complaint proposes an aggregate civil penalty for the violations of \$300,000 and requests a Compliance Order. ¹

¹ Currently pending is Complainant's Motion to Amend Complaint, which Respondent has opposed. That Motion will be ruled upon in due course.

On February 8, 2006, Respondent filed a Motion for Accelerated Decision asserting that Counts 1, 2, 3, and 5 should be dismissed on the grounds that EPA failed to give prior notice of the alleged violations to the State of Minnesota as required by RCRA Section 3008(a)(2) (42 U.S.C. § 6928(a)(2)). Complainant filed an Opposition to the Motion on February 23, 2006 alleging it did provide the State with proper notice. On February 6, 2006, Respondent filed a Reply to Complainant's Opposition suggesting that whatever notice was given to the State was insufficient.

II. Standard for Accelerated Decision

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Rules of Practice"). Section 22.20(a) of the Rules of Practice authorizes the Administrative Law Judge to "render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *See, e.g., BWX Technologies, Inc.*, 9 E.A.D. 61, 74-75, 2000 App. LEXIS 9, *34 (EAB 2000); *Belmont Plating Works*, EPA Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65, *8 (ALJ, Order Granting in Part and Denying in Part Complainant's Motion for Accelerated Decision on Liability, Sept. 11, 2002). Therefore, federal court rulings on motions for summary judgment under FRCP 56 provide guidance for adjudicating motions for accelerated decision under Rule 22.20(a) of the Rules of Practice. *See CWM Chemical Service*, 6 E.A.D. 1, 95 EPA App. LEXIS 20, *25 (EAB 1995).²

Rule 56© of the FRCP provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law." Thus, summary judgment is to be decided on the "pleadings, depositions, answers to interrogatories, and admissions on file, together with []

² *See also, Patrick J. Neman, D/B/A The Main Exchange*, 5 E.A.D. 450, 455, n.2, 1994 App. LEXIS 10, *14 (EAB 1994) ("In the exercise of ... discretion, the Board finds it instructive to examine analogous federal procedural rules and federal court decisions applying those rules. *See Wego Chemical & Mineral Corporation*, 4 E.A.D. 513, 524, n.10, 1993 EPA App. LEXIS 6, *26 n.10 (EAB 1993) (although the Federal Rules of Civil Procedure do not apply to Agency proceedings under Part 22, the Board may look to them for guidance); *Detroit Plastic Molding*, 3 E.A.D. 103, 107, 1990 EPA App. LEXIS 4, *9 (CJO 1990) (same).").

affidavits” (FRCP 56©), but in addition, a court may take into account any material that would be admissible or usable at trial. *Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir 1993), citing, 10A Charles A. Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 2721 at 40 (2d ed. 1983); *Pollack v Newark*, 147 F. Supp. 35 (D.N.J. 1956)(In considering a motion for summary judgment, a tribunal is entitled to consider exhibits and other papers that have been identified by affidavit, or otherwise made admissible in evidence), *aff’d*, 248 F.2d 543 (3d Cir. 1957), *cert. denied*, 355 U.S. 964 (1958). Such material may include documents produced in discovery. *Hoffman v. Applicators Sales & Service, Inc.*, No. 05-1543, 2006 U.S. App. LEXIS 4164 * 15 (1st Cir., Feb. 22, 2006), citing, 11 James M. Moore, et al., Moore’s Federal Practice § 56.10 (Matthew Bender 3d ed.)(courts generally accept use of documents produced in discovery as proper summary judgment material).

III. Statutory Provision at Issue

RCRA Section 3008(a) states in pertinent part:

(1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

(2) In the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title, *the Administrator shall **give notice** to the State in which such violation has occurred **prior to** issuing an order or commencing a civil action under this section.*

42 U.S.C. § 6928(a)(1) & (2) (emphasis added).

The Environmental Appeals Board has suggested that the notice requirement of Section 3008(a)(2) is not jurisdictional or a mandatory condition precedent to filing suit. *See, Municipal & Industrial Disposal, Co.*, 2 E.A.D. 655, 1988 EPA App. LEXIS 7, *7, n.10 (EAB 1988) (“M&I has offered no arguments to show, however, that failure to give prior notice under RCRA §3008(a)(2) is a jurisdictional or other bar to enforcement. Moreover, our independent research has failed to indicate that omitting to provide the notice required by RCRA § 3008(a)(2) deprives

the Agency of its enforcement authority.”). *Cf. Hallstrom v. Tillamook County*, 493 U.S. 20 (1989)(holding 60 day notice provision with regard to RCRA citizens’ suits in 42 U.S.C. §6972(b)(1) is mandatory condition precedent).

IV. Positions of the Parties

The parties do not appear to dispute that Respondent operates its facility in the State of Minnesota and that at all times relevant hereto Minnesota was a state authorized to carry out a hazardous waste program under RCRA Section 6926 (42 U.S.C. § 6926). *See*, Complaint ¶¶ 12, 6; Answer ¶ 4; Respondent’s Memorandum of Law in Support of its Motion for Accelerated Decision at 6-7 (hereinafter cited as “R’s Memo”).

The Complaint and Compliance Order initiating this matter alleged at paragraph 8 that: “U.S. EPA has provided notice of commencement of this action to the State of Minnesota pursuant to Section 3008(a)(2) of RCRA, 42 U.S.C. 6928(a)(2).” Complaint ¶ 8.

In its Memorandum filed in support of its Motion for Accelerated Decision, Respondent acknowledges that EPA conducted an inspection of its facility on May 17, 2001 and, in regard thereto, on *September 12, 2001*, issued an “Enforcement Action Notice” to the Minnesota Pollution Control Agency purportedly giving the State of Minnesota the requisite notice under RCRA Section 3008 of EPA’s intent to file suit for the violations found during such inspection. R’s Memo at 1-2. However, Respondent argues therein that Counts 1, 3 and 5 allege violations occurring long *after* the notice was given on September 12, 2001, and in fact allege violations continuing up until August 25, 2005, a period of almost four years after the 2001 notice. In that these later violations were not included in the 2001 notice to the State, Respondent claims that EPA is not authorized to commence a civil action in regard thereto under RCRA Section 3008. *Id.* at 2-4, 8. As to Count 2, which Respondent acknowledges alleges a violation limited in time to 2001, Respondent states that the 2001 Section 3008(a) notice to the State did not include it therein and therefore it too is not the proper subject of an enforcement action by EPA. *Id.* at 3, 8. Respondent supports its Motion with a copy of the September 12, 2001 Notice and the Affidavit of its counsel, Joseph G. Maternowski, dated February 8, 2006, indicating that on October 4, 2005, he review the Minnesota Pollution Control Agency’s file on Respondent and spoke to its employees and “did not find any evidence of correspondence from EPA to the Minnesota Pollution Control Agency in regard to the violations listed [in] Counts 1, 2, 3 and 5 of the August 25, 2005, Administrative Complaint and Compliance Order against Respondent.”

In its Memorandum of Law in Opposition to Respondent’s Motion (“C’s Opp”), Complainant states that not only did it send Minnesota the September 12, 2001 notice pursuant to RCRA section 3008, but it also sent *two additional notices* pursuant to that section to Minnesota in the days immediately preceding the filing of this action. *See*, C’s Opp at 3-4. Specifically, Complainant alleges it sent another notice by facsimile to Minnesota on August 24, 2005, two days prior to filing this action, and an additional notice by e-mail on August 25, 2001, the day before filing. *Id.* Complainant suggests that these three notices fulfilled the

requirements of RCRA Section 3008(a)(2) in regard to all the allegations contained in the Complaint, although Complainant acknowledges that those notices did not specifically advise the State of the “personnel training” violations (as opposed to recordkeeping violations) alleged in Count 1 or the contingency plan violation alleged in Count 2, asserting that the notice required under section 3008(a)(2) is merely “notice that an order is about to be issued or a civil action commenced, because of a violation or violations of RCRA” and that “[t]here is no requirement that the Administrator notify the State of each violation committed, or risk losing the right to bring an enforcement action that includes each violation.” C’s Opp at 2-6. Complainant supports its Opposition by referencing certain exhibits in its Prehearing Exchange (“C’s PHE”) and the Affidavits of two EPA employees, Joseph Boyle and Lorna Jereza, both dated February 28, 2006, regarding the issuance of the second and third notices.³

Respondent in its Reply to Complainant’s Opposition (“R’s Reply”) asserts that, even accepting that EPA sent the State three Section 3008(a) notices, those notices are still insufficient in that they “did not contain enough detail so that the State of Minnesota could ‘discern with reasonable certainty . . . what type of activities gave rise to the violations’” as required under Section 3008(a)(2). *See*, Respondent’s Reply at 1, *quoting Gordon Redd Lumber Company*, 5 E.A.D. 301, 314-15 (EAB 1994).

V. The Notices

It is Complainant’s assertion that EPA, specifically, Joseph M. Boyle, Chief of Enforcement and Compliance Assurance Branch of the Waste, Pesticides, and Toxics Division, U.S. EPA Region 5, in his official capacity and in accordance with the authority delegated to him, issued a total of three (3) notices under RCRA Section 3008(a) to the State of Minnesota in regard to the enforcement action the Agency intended to file against Respondent.

The first notice consists of a two page letter from Mr. Boyle to “Ann Foss, Section Manager, North/South Major Facilities, Minnesota Pollution Control Agency” (MPCA), dated September 12, 2001, referencing “Enforcement Action Notice Minnesota Metal Finishing, Inc.” The letter indicates that copies of it were sent to “Dan Nelson, Hennepin County” and “Raymond Bissonnette, MPCA.” Attached to the letter is a separate “Certificate of Service” indicating that on September 12, 2001, it was sent by certified mail, return receipt requested, to Ms. Foss and that copies of the letter referred to therein as an “Enforcement Action Notice,” was also sent by first class mail to “Raymond T. Bissonnette, Major Facilities Section, Policy and Planning Division, Minnesota Pollution Control Agency,” as well as to “Mike Risse, Senior Environmentalist, Hennepin County, Department of Environmental Services, Environmental Protection Division.” The body of this letter reads in full as follows:

³ No opposition having been received, and otherwise for good cause shown, Complainant’s Motion for Leave to Submit Affidavits filed February 28, 2006, is hereby **GRANTED**.

In coordination with the Minnesota Pollution Control Agency, the United States Environmental Protection Agency (U.S. EPA), Region 5, Enforcement and Compliance Assurance Branch conducted a compliance inspection on May 17, 2001, at the Minnesota Metal Finishing Incorporated (MMF) facility located in Minneapolis, Minnesota. The facility is a large quantity generator of hazardous waste.

The inspection identified several violations of Minnesota and Federal hazardous waste regulations. Specifically, the facility failed to minimize the potential releases of hazardous waste to the environment; failed to manage its hazardous waste containers properly, failed to have adequate emergency communications equipment; failed to complete the Land Disposal Restriction (LDR) paperwork when shipping hazardous waste off-site; and failed to maintain training records on-site.

U.S. EPA has evaluated the inspection findings and determined that the nature of the violations identified classify the facility as a significant non-complier, as defined in U.S. EPA's 1996 Hazardous Waste Civil Enforcement Response Policy (ERP), due to substantial deviation from fundamental statutory and regulatory requirements of the Resource Conservation and Recovery Act (RCRA). The ERP also requires that formal enforcement be initiated that includes the collection of a monetary penalty.

In accordance with Section 3008(a)(2) of RCRA, this letter provides notice to the State of Minnesota of our intent to issue an Administrative Complaint and Compliance Order to MMF located at 909 Winter Street, Northeast, Minneapolis, Minnesota. We anticipate seeking a significant monetary penalty as well as injunctive relief necessary to re-establish compliance with the applicable regulations.

If you have questions or concerns related to the issuance of this order, please contact Lorna M. Jereza, of my staff, at (312) 353-5110

*See, C's PHE Ex. 15 (emphasis added); R's Memo, Ex. A.*⁴

⁴ The copy of letter attached to Respondent's Memorandum is marked "Received Hennepin County Environmental Services September 12, 2001," and so it appears that the letter
(continued...)

The second RCRA Section 3008 notice Complainant alleges it sent to the State of Minnesota is a single page letter dated August 24, 2005 from Mr. Boyle to “Robert Dullinger, Hazardous Waste Compliance & Enforcement, Industrial Division, Minnesota Pollution Control Agency” referencing Respondent. The letter indicates that it was to be sent “Certified Facsimile and Mail Return Receipt Requested” and accompanying pages indicate it was “successfully” sent by facsimile by Lorna M. Jereza to Mr. Dullinger on August 24, 2005 at 4:03 p.m. The body of this correspondence reads:

Pursuant to Section 3008(a)(2) of the Resource Conservation and Recovery Act (RCRA) as amended, I am providing notice to you that the United States Environmental Protection Agency (U.S. EPA) is preparing to issue an Order under Section 3008(a)(1) to Minnesota Metal Finishing, Incorporated, located at 909 Winter Street, N.E., Minneapolis, Minnesota. The Order is in response to the May 17, 2001, inspection by the U.S. EPA, and the subsequent Hennepin County inspections, and addresses violations of the Minnesota regulations codified at Minn. R. Chapter 7045, standards applicable to generators of hazardous waste and hazardous storage facilities, and Minn. R. Chapter 7001, requiring a hazardous waste storage permit.

If you have any questions regarding this letter, please contact Michael Valentino of my staff, at (312) 886-4582.

See, C’s PHE Ex. 32 (emphasis added); Affidavits of Joseph Boyle and Lorena Jereza, dated February 28, 2006.⁵

⁴(...continued)

was in fact sent and received at least by *someone* at the County. However, it is unclear why the Certificate of Service accompanying the letter states that it was sent to “Mike Risse” at the County, when the letter itself suggests that a copy of it was to be sent to “Dan Nelson” of Hennepin County. *See*, R’s Memo., Ex. A. The Affidavit of Mr. Boyle submitted by Complainant in connection with Respondent’s Motion does not mention this letter at all. *See*, Affidavit of Joseph Boyle, dated February 28, 2006.

⁵ Although the letter suggests it was to be sent certified mail as well as by facsimile, the Complainant’s Affidavits regarding it do not indicate that the second notice was ever sent by mail, through the post office, in any manner and there are no documents attached to the exhibit indicating that it was. *See*, Complainant’s Prehearing Ex. 32; Affidavits of Joseph Boyle and Lorena Jereza, dated February 28, 2006. Respondent alleged in its Reply Memorandum that upon being contacted “Mr. Dullinger had no *recollection* of receiving any § 6928(a)(2) notices in 2005,” however it does not assert therein, as a fact that the State did not actually receive the

(continued...)

The third Section 3008(a) notice Complainant alleges it sent to Minnesota is an e-mail sent by Mr. Boyle on August 25, 2005 at 2:44 p.m. from what appears to be his work (EPA) e-mail address to Mr. Dullinger and Gordon Wegwart of the Minnesota Pollution Control Agency at their work e-mail addresses, as well as to several EPA employees. The subject of the e-mail is “Enforcement Action Communication - Minnesota Metal Finishing, Incorporated.” The e-mail reads in full -

This is to inform you that on Friday, August 26, 2005, U.S. EPA will file an administrative complaint against Minnesota Metal Finishing, Incorporated at 909 Winter Street, N.E., Minneapolis, Minnesota alleging violations of RCRA detected in a series of inspections beginning on May 17, 2001. The complaint seeks compliance and a civil penalty of \$300000.

A press release is planned.

The staff contact for this matter is Michael Valentino (312) 886-4582.

See, C’s PHE Ex. 32; Affidavit of Joseph Boyle dated February 28, 2006.⁶

VI. Discussion

The Environmental Appeals Board’s decision in *Gordon Redd Lumber Company*, 1994 EPA App. LEXIS 29, 5 E.A.D 301 (EAB 1994), cited in Respondent’s Reply, provides precedential guidance as to the requisite content of notices issued by EPA under RCRA Section 3008(a)(2) and is particularly relevant here in that the Respondent in that case, Gordon Reed Lumber Company (“GR”), made essentially the same arguments as Respondent is making here

GR also argues that the Region’s notice of intent did not fully satisfy section 3008(a)(2) because it did not identify every

⁵(...continued)

notice, or argue that the State’s failure to actually receive a notice sent, would constitute the failure to “give notice” under Section 3008(a)(2). *See*, R’s Reply at 1, n.1 (italics added).

⁶ Mr. Boyle states in his Affidavit that he transmitted the e-mail via his computer on August 25, 2005, but the documents attached to it indicated as “History” only that it had been “forwarded.” *See*, C’s PHE Ex. 32. As indicated above, Respondent alleged in its Reply Memorandum that upon being contacted “Mr. Dullinger had no recollection of receiving any § 6928(a)(2) notices in 2005.” *See*, R’s Reply, at.1, fn.1.

violation to be charged in the Agency's Amended Complaint. Specifically, GR points out that the Region's notice of intent did not identify GR's failure to obtain liability insurance, which was one of the violations alleged in the Amended Complaint. GR contends, therefore, that the notice was not effective as to that particular violation and that the count of the Amended Complaint relating to that violation must be dismissed. **We disagree, for we do not believe that a strict correspondence between the notice and the complaint is necessary under the terms of the statute or to accomplish the purpose of giving notice to the State.**

As to the terms of the statute, section 3008(a)(2) provides that "the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section." Although this sentence does not describe the content of the notice, it is clear from the structure of the sentence that the Region is required to **give notice of the fact** that it intends **to bring an enforcement action. The sentence does *not* specify, however, that the notice must identify the violations to be charged in the enforcement action.** This contrasts with the citizens suit provision at section 7002(b) of RCRA, 42 U.S.C. § 6972 (b), where the language is more specific, stating that the person who intends to bring the suit must first give 60 days advance "notice *of the violation*" to the Administrator, the State and the alleged violator. Similarly, other provisions of RCRA call for more specificity when deemed necessary by Congress. Thus, if Congress wanted to require notice of the violation to be charged in an enforcement action, it knew how to do so and did so expressly. The fact that Congress did not use the same language in section 3008(a)(2), therefore, suggests that it did not intend to require the same level of detail. "[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *City of Chicago v. Environmental Defense Fund*, 62 U.S.L.W. 4283 (U.S., May 3, 1994)(No. 92-1639)(quoting *Keene Corp. v. United States*, 508 U.S. , , (1993) (slip. op., at 7-8)(internal quotation marks omitted)).

Nor is that level of detail required by the purpose of the notice requirement. As discussed above, the purpose of the notice requirement is to promote comity between the Agency and authorized States in the implementation of RCRA. [] If that purpose could only be achieved by giving the State enough time to decide whether to bring its own enforcement action, then

perhaps the State would need notice of each violation to be charged in the complaint. As we have concluded above, however, giving the State enough time to bring its own enforcement action is not the only way of fulfilling the purpose of promoting federal/State comity. Accordingly, we are not convinced that the purpose of the notice requirement can only be served by giving the State advance notice of every violation to be charged in the complaint. **Rather, we believe that if, as is the case here, the notice enables the State to discern with reasonable certainty who is being charged with misconduct, where the misconduct took place, and what type of activities gave rise to the misconduct, the State will be accorded the dignity and stature to which it is entitled under the Act, thus fully serving the purpose of the notice requirement.** Omitting reference in the notice to violations of a few specific regulations poses no substantial threat to the doctrine of comity that underlies the statutory notice requirement. In this case the notice given by the Region easily fulfilled the purpose of the notice requirement by identifying the person who was the subject of the enforcement action and the facility where the violations allegedly occurred, by describing the activities that gave rise to the violations (*i.e.*, storage of hazardous waste in the surface impoundments and the storage of waste in the garbage bags), and by listing most of the specific regulations that GR would ultimately be charged with violating in the enforcement action.

Gordon Redd, 1994 EPA App. LEXIS at 35-39, 5 E.A.D. at 313-15 (italics in original, bold added, footnotes omitted).⁷

⁷ *Gordon Redd* involved “overfiling,” that is the filing of an enforcement action by EPA after the State had instituted an enforcement action for the same or similar violations against the Respondent. In that case, the EAB also rejected a number of other arguments regarding the insufficiency of the Section 3008(a)(2) notice raised by the Respondent and held that Section 3008(a)(2) does not require that EPA cite the section in its administrative complaint or require EPA to issue a second notice if a State initiated an enforcement action against the Respondent based upon the first notice, it does not give the states a “first right of refusal” before EPA can proceed, and EPA “can satisfy the requirement by giving notice to an affected State just hours, or even moments, before filing an action against a violator.” The EAB also held that while the Agency may agree by Memorandum to the provision of greater notice to the State, the Respondent is not an intended beneficiary of such an agreement and may not raise the noncompliance with the agreement as a defense to an enforcement action nor is compliance with such an agreement a condition precedent to suit. However, it did not rule on the general issue of (continued...)

Thus, according to *Gordon Redd*, to satisfy the requirements of RCRA Section 3008(a)(2), Complainant must show that, prior to filing this action, it gave notice to Minnesota such that the State was able to discern “with reasonable certainty”:

- (1) who is being charged with misconduct;
- (2) where the misconduct took place; and
- (3) what type of activities gave rise to the misconduct.

In its Reply Memorandum, Respondent appears to implicitly concede that the EPA’s notices advised the State with reasonable certainty who was being charged and where the misconduct took place satisfying the first and second criteria under *Gordon Reed*. However, Respondent argues that the EPA’s notices did not meet the third criterion of that standard - that they failed to describe, with reasonable certainty, what type of activities gave rise to the violations cited in Counts 1, 2, 3 and 5.⁸ R’s Reply, at 4.

Specifically, Respondent claims that the September 12, 2001 notice mentioning that it “failed to maintain training records on-site,” based upon what Respondent surmises is the fact that during the May 17, 2001 inspection EPA discovered that the employee responsible for such records, who was working at home due to a medical condition, had taken the records home with her, does not describe with reasonable certainty the allegations in Count 1 regarding the failure to “properly train employees” up through August 25, 2005, or have written job descriptions, or a written description of the type and amount of introductory and continued training. R’s Reply, at 4-5. Similarly, Respondent states that the September 2001 notice referring to the broad requirement to minimize the possibility of release does not describe with “reasonable certainty” the violation in Count 3, which Respondent characterizes as alleging that it failed “to properly

⁷(...continued)

whether failing to comply with Section 3008(a) would constitute a defense to an enforcement action on the basis that it found that the notice requirement had been fulfilled in that case. *See, Gordon Redd*, 1994 EPA App. LEXIS at *23, n.7, *35-41, 5 E.A.D. at 309 n.7, 309-15.

⁸ In its Reply, Respondent here appears also to be implicitly challenging the correctness of the EAB’s holdings in *Gordon Redd* itself regarding timing and sufficiency of notice under Section 3008(a)(2) by citing to *United States v. Power Engineering Co.*, 125 F. Supp 1050, 1060 (D. Colo. 2000), wherein the court suggested that Congress included the notice provision to minimize the likelihood of duplicative actions by “providing the states with *the opportunity* to incorporate the remedies or claims identified by the EPA into either new or existing enforcement actions *before* the EPA institutes its own action” and *United States v. Conservation Chemical Company of Illinois*, 660 F. Supp. 1236, 1245 (N.D. Ind. 1987), stating that the “Administrator is required to give **notice of violations** of this title to the states.” *See*, R’s Reply, at 2-3 (emphasis in original). However, none of those Federal court decisions specifically addresses and/or conflicts with the EAB’s holdings in *Gordon Redd*, so this Tribunal has no basis for disregarding or reconsidering the precedential guidance provided by *Gordon Redd*.

maintain its floor for a period up to and including August 25, 2005." *Id.* at 5-6. Likewise, Respondent states none of the notices advised the State of the allegations in Count 2 regarding the lack of a contingency plan (which Complainant acknowledges) nor the allegations in Count 5 that from 1984 to August 25, 2005, it should have had a hazardous waste permit because it failed to comply with a number of the requirements that would otherwise exempt it. *Id.* at 5, 7.

Furthermore, Respondent states in its Reply that "[t]here is no evidence in the present case that the State of Minnesota is unwilling or unable to resolve the present dispute" (R's Reply at 3, n. 2) and that Counts 1, 2, 3 and 5 should be dismissed so that the State of Minnesota can "decide whether it wishes to act in accordance with its primacy RCRA enforcement role as an 'authorized' state." R's Reply at 8. Respondent even proffers an offer to waive any possible statute of limitations defense that may arise due to delay in a subsequent filing by the State of Minnesota, its subdivisions, or EPA, to facilitate the State of Minnesota being given an opportunity to act. R's Reply at 8.

Respondent's arguments as to the insufficiency of the EPA's Section 3008(a)(2) notices have some superficial appeal when the notices and Complaint are viewed in isolation, however, a complete review of the record in this case evidences that the State of Minnesota has had more than adequate notice of the violations alleged in the Complaint before the case was filed and was given more than an adequate opportunity to act on "its primacy RCRA enforcement role as an authorized state" had it wished to do so.

It has been held that "notice-in-fact" of the alleged violations satisfies the requirement of Section 3008(a)(2). *The Beaumont Company*, EPA Docket No. RCRA-III-238, 1994 EPA ALJ LEXIS 32 * 44-47 (ALJ, Order Granting in Part Motion for Accelerated Decision, Oct. 20, 1994)(oral notice, by series of phone conversations, regarding alleged violations, was sufficient to satisfy notice requirement of RCRA § 3008(a)(2)), citing, *U.S. EPA v. Environmental Waste Control*, 710 F. Supp. 1172, 1190 (N.D. Ind. 1989)(relevant inquiry for notice under citizen suit provision, RCRA § 7002, was whether the parties had "notice-in-fact" of the alleged violations), *aff'd on other grounds*, 917 F.2d 327 (7th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

As acknowledged by Respondent, the initial "Compliance Evaluation Inspection" of its facility occurred on May 17, 2001 and was carried out by representatives of EPA (as well as Hennepin County Department of Environmental Services (DEP) authorities). However, what Respondent neglects to mention, is that prior to carrying out the initial inspection, EPA *notified* the State of Minnesota Pollution Control Agency (MPCA) authorities of the impending inspection and gave them an opportunity to attend, but for whatever reason, MPCA "did not participate." See, C's PHE Ex. 1. More importantly, Respondent omits the fact that, after the initial inspection, and *over the course of the next four years*, both EPA and County authorities consistently gave State of Minnesota authorities an opportunity to stay "in the loop" regarding the violations of the hazardous waste regulations they found at Respondent's facility during various inspections, violations later incorporated into the Complaint filed here, by providing it with over a dozen pieces of correspondence including that exchanged among EPA, County

authorities and Respondent concerning operations at Respondent's facility. *See*, C's PHE Exs. 7, 8, 10, 11, 15, 17, 19, 20, 22, 24, 26, 27, 29. Among the relevant documents received by the State of Minnesota (MPCA) were the following:

a) July 9, 2001, EPA's Request For Information (RFI) addressed to Respondent inquiring into specific aspects of its operations in order to determine the "facility's compliance status" with RCRA Federal regulations 40 C.F.R. Parts 262, 265, 268, 270, 273, and 279 and the Minnesota Hazardous Waste Rules Chapter 7045. C's PHE Ex. 8 .

b) September 12, 2001, EPA's (first) "Enforcement Action Notice" under RCRA Section 3008(a)(2) sent to State of Minnesota regarding the violations found during May 17, 2001 inspection of Respondent's facility. C's PHE Ex. 15.

c) September 26, 2001, cover letter from Hennepin County DEP to EPA referring to "attached Violations Summary Report" enclosing "Site Visit Reports, Analytical Results and Photographs" from County inspections of Respondent's facility conducted on June 12, 2001 and August 7, 2001 as well as "a list of violations we believe are supported by our observations at these inspections and our joint inspection with you on 5/17/01." C's PHE Ex. 7.⁹

d) August 7, 2002, second EPA RFI issued to Respondent requesting information regarding its compliance in certain respects with Federal RCRA regulations and the State Minnesota Hazardous Waste Rules Chapter 7045. C's PHE Ex. 10.

e) September 16, 2002, EPA letter to Respondent clarifying second RFI request. C's PHE Ex. 11.

f) March 17, 2003, Hennepin County DEP letter to EPA which is an itemized list of violations found during County inspections of Respondent's facility conducted on November 13 and 26, 2002. C's PHE Ex. 17.

g) April 27, 2004, Hennepin County DEP Notice of Inspection (NOI) to Respondent regarding action required of Respondent to come into compliance with Minnesota Rules Chapter 7045 based upon County inspection conducted on April 2, 2004. C's PHE Ex. 19.

h) May 6, 2004, Hennepin County DEP NOI to Respondent regarding action required of Respondent to come into compliance with Minnesota Rules Chapter 7045 based upon County inspection conducted on April 2, 2004. C's PHE Ex. 20.¹⁰

⁹ C's PHE Ex. 7 does not indicate if the enclosures were sent to MCPA as well as to EPA.

¹⁰ The record is not clear as to why the County DEP sent essentially identical letters (C's (continued...))

i) August 20, 2004, EPA letter to Respondent listing specific violations of RCRA and Minn. R. Part 7045 regulations, mentioning the anticipated filing of an “*administrative complaint under Section 3008 of RCRA, 42 U.S.C. § 6928*” with a proposed civil penalty of \$300,000. C’s PHE Ex. 22 (italics added).

j) December 28, 2004, EPA letter to Respondent regarding meeting to confer scheduled for January 6, 2005 regarding Respondent’s ability to pay proposed penalty for violations alleged. C’s PHE Ex. 24.

k) February 1, 2005, EPA’s letter to Respondent asking for additional financial records in support of Respondent’s claim of inability to pay anticipated proposed penalty. C’s PHE Ex. 26.

l) June 15, 2005, Hennepin County DEP NOI to Respondent regarding action required of it to come into compliance with Minnesota Rules Chapter 7045 based upon County inspection conducted on April 29, 2005, noting that a review of the company’s files evidences “*a distinct pattern of non-compliance. There have been violations noted at most or all hazardous waste compliance inspections.*” C’s PHE Ex. 29 (italics added).

m) August 24, 2005, EPA letter to MPCA stating “I am providing notice to you that [EPA] is preparing to issue an Order under Section 3008(a)(1) to [Respondent]The Order is in response to the May 17, 2001, inspection by the U.S. EPA, and the subsequent Hennepin County inspections, and *addresses violations of the Minnesota regulations codified at Minn. R. Chapter 7045, standards applicable to generators of hazardous waste and hazardous storage facilities, and Minn. R. Chapter 7001, requiring a hazardous waste storage permit.*” C’s PHE Ex. 32 (italics added).

n) August 25, 2005, EPA e-mail to MPCA stating that “This is to inform you that on Friday, August 26, 2005, U.S. EPA will file an administrative complaint against Minnesota Metal Finishing, Incorporated at 909 Winter Street, N.E., Minneapolis, Minnesota alleging violations of RCRA *detected in a series of inspections beginning on May 17, 2001.*” C’s PHE Ex. 32 (italics added).

These documents clearly contain references to violations found at Respondent’s facility which appeared as allegations in the Complaint subsequently filed. For example, Count 1 alleges Respondent failed to adequately train certain of its employees, as well as maintain records of such training, employee job titles, and job descriptions in violation of Minn. R. 7045.0454, Subparts 1, 2, 3, 5, 6.A-6.C (40 C.F.R. §§ 264.16(a)(1)-(3), (b), ©, (d)(1)-(d)(3)). Among the documents the State of Minnesota received prior to Complaint being filed which

¹⁰(...continued)

PHE Ex. 19 and 20) to Respondent approximately 10 days apart but copies of both letters appear to have been sent to MCPA. See, C’s PHE Exs. 19 and 20.

mentioned this violation was C's PHE Ex. 10 (RFI dated August 7, 2002 issued in response to initial inspection results) which specifically asked for records regarding date of hire of employees, position held, training guidelines, date of training, the date Respondent's record on training were maintained off-site, *etc.*; C's PHE Ex. 17 (County letter to EPA dated March 17, 2003 referring to November 13 & 26, 2002 inspections of Respondent's facility) noting that "the Company failed to include a complete list of employees filling each hazardous waste job title," the amount and frequency of training, *etc.*; C's PHE Ex. 19 (County letter to Respondent dated April 27, 2004 referring to results of April 2, 2004 inspection) stating that Respondent must comply with Minn. R. 7045.0558 and have facility personnel complete training program initially and yearly and maintain records at facility of job title, written job description, training to be given and training received and that inspection revealed such documentation missing for 2003; C's PHE Ex. 20 (County NOI to Respondent dated May 6, 2004 regarding April 2, 2004 inspection) advising Respondent of need to come into compliance regarding training and maintaining necessary personnel records; C's PHE Ex. 22 (EPA letter to Respondent dated August 20, 2004) noting that EPA has determined that Respondent is in noncompliance in regard to training and personnel records and proposing civil penalty of \$300,000; and C's PHE Ex. 29 (County NOI to Respondent dated June 15, 2005 referring to April 29, 2005 inspection) advising Respondent of need to train hazardous waste personnel and maintain personnel records which were not available at inspection, noting distinct pattern of non-compliance.

Count 2 alleges Respondent failed to include in its facility's Contingency Plan at all required times an evacuation plan, a named Primary Emergency Coordinator, identification of emergency equipment capability, and obtain the agreement to such Plan from local emergency response officials, in violation of Minn. R. 7045.0466, Subpart 4.C-F (40 C.F.R. §§ 264.52(c)-(f)). The correspondence the State of Minnesota received mentioning these types of violations included: C's PHE Ex. 8 (EPA RFI dated July 9, 2001 based upon initial inspection) requesting copy of Respondent's evacuation plan; C's PHE Ex. 17 (County letter to EPA dated March 17, 2003 referring to November 13 & 26, 2002 inspections of Respondent's facility) advising that "Company failed to show proof that Contingency Plan had been submitted to local authorities;" C's PHE Ex. 19 (County letter to Respondent dated April 27, 2004 referring to results of April 2, 2004 inspection) referring to Minn. R. 7045.0572 and noting upon inspection contingency plan was deficient in that it did not include description of emergency equipment and their capabilities; C's PHE Ex. 20 (County NOI dated May 6, 2004 to Respondent) regarding need to remedy deficiencies in contingency plan; and C's PHE Ex. 22 (EPA letter to Respondent dated August 20, 2004) noting that EPA has determined that Respondent is in noncompliance in regard to its contingency plan and proposing civil penalty of \$300,000.

Count 3 of the Complaint alleges that Respondent failed to maintain and operate its facility to minimize the possibility of fire, explosion, or any unplanned release of hazardous waste in violation of Minn. R. 7045.0462, Subparts 1.G and 2 (40 C.F.R. §§ 262.34(a)(4) and 264.31). Among the documents the State of Minnesota received mentioning this type of violation were the following: C's PHE Ex. 7 (cover letter from Hennepin County DEP to EPA dated September 26, 2001 reporting on inspections conducted June 12, 2001 and August 7, 2001) noting cracked concrete floor under anodizing line and compromised floor coatings and

“high probability that the capacity of the flooring to contain hazardous wastes to which it is constantly exposed has been compromised;” C’s PHE Ex. 8 (EPA RFI dated July 9, 2001 based upon initial inspection) requesting records on chemicals contained in zinc plating and anodizing lines, the hazardous waste codes used in regard thereto, a diagram of floor coatings existing or non-existent, floor repairs, when nickel seal acetate “stopped” splashing over the side of its bath, reason for “gap in berm” around pit; date sludge box and used oil labeled as hazardous; C’s PHE Ex. 10 (RFI dated August 7, 2002 issued in response to initial inspection results) asking for records on hazardous wastes generated and thickness of flooring, sludge observed on floor, cracks in floor, floor resurfacing; C’s PHE Ex. 17 (County letter to EPA dated March 17, 2003 referring to November 13 & 26, 2002 inspections of Respondent’s facility) citing Minn. R. 7045.0292, .0566, .0275, .0214, .0292 and noting that Respondent “failed to maintain and operate its facility in a manner to minimize the possibility of a fire, explosion or any sudden or nonsudden release to air, land or water of hazardous waste . . . by allowing plating waste to be released to the floor, which is causing the floor to degrade and could potentially be released to the environment,” failed to recover hazardous waste that had spilled allowing accumulation on floor, failed to evaluate spilled waste, failed to mark accumulation date on bags of sludge; C’s PHE Ex. 19 (County letter to Respondent dated April 27, 2004 referring to results of April 2, 2004 inspection) referring to Minn. R. 7045.0566 noting flooring in several areas severely corroded and compromised as observed upon prior inspections and floor needs to be repaired; C’s PHE Ex. 20 (County NOI dated May 6, 2004 to Respondent) regarding need to remedy deficiencies in flooring and recovery after spills and managing hazardous waste; C’s PHE Ex. 22 (EPA letter to Respondent dated August 20, 2004) noting that EPA has determined that Respondent is in noncompliance in regard to recovery of hazardous wastes and noting proposed civil penalty of \$300,000; and C’s PHE Ex. 29 (County NOI to Respondent dated June 15, 2005 referring to April 29, 2005 inspection) regarding observation of severely corroded and compromised flooring and noting distinct pattern of non-compliance.

Count 5 alleges that Respondent failed to obtain a permit from Federal or State authorities for the storage of hazardous waste in violation of Minn. R. 7001.0030 and 7001.0520, Subpart a.A. The documents received by the State of Minnesota mentioning this violation included C’s PHE Ex. 22 (EPA letter to Respondent dated August 20, 2004) noting that EPA has determined that Respondent was required to obtain a hazardous waste storage permit and failed to do so, in violation of Minn. R. parts 7001.0030, .0520, .0530, .0550, and noting proposed civil penalty of \$300,000.

Thus, by the time EPA sent what it has identified as its second and third Section 3008(a) notices to Minnesota in the days immediately proceeding the filing of the Complaint, the State had received many, many documents advising it of the specific violations EPA and County inspectors had allegedly found upon inspection of Respondent’s facility over the prior four years which were to be the basis for the Complaint. Therefore, while the language in those subsequent notices standing alone may seem quite unspecific, referring generally to violations found during a series of inspections, it in fact represents and incorporates a long history of specific violations allegedly found at Respondent’s facility as to which EPA had previously made the State well aware. As a result, I conclude that from the Section 3008 notices it

received, the State of Minnesota could, with “reasonably certainty,” know “what type of activities gave rise to the misconduct” within the meaning of *Gordon Redd*.¹¹

For the same reasons, I find no merit to Respondent’s argument that this case should be dismissed so that the “State of Minnesota can decide whether it wishes to act in accordance with its primacy RCRA enforcement role as an authorized state.”¹² R’s Reply, at. 8. It is clear from the record in this case that the State of Minnesota has had five years to decide whether to initiate its own action against Respondent for the violations found during the various inspections conducted by EPA and the County, and, as far as the record reveals, it has either never made such a decision or has affirmatively decided not to act. *See*, Boyle Affidavit ¶¶ 5, 6 (indicating that Minnesota has never “expressed to any person at U.S. EPA Region 5, a desire to bring a State of Minnesota enforcement action for any of the violations alleged in the Complaint” and that EPA has never received from Minnesota a response to either its second or third Section 3008(a) notices). Therefore, there is no reason to believe that the State *would act* at this point, and providing it with another opportunity to do so would be futile and thus is unnecessary.¹³ *United States v. Santos-Pinon*, 146 F.3d 734 (9th Cir. 1998)(the law does not

¹¹ It is also observed that Section 3008(a)(2) does not specify that the requisite notice to the State must specify that it is being given pursuant to that section. Thus, arguably, *all* communications by EPA to the State (correspondence however transmitted and even oral communications had there been any) could constitute separately and/or together the “notice” required under Section 3008(a)(2).

¹² In both its Answer to the Complaint and Reply to the instant Motion (at 8, n. 3), Respondent suggests that it has a defense to this action based upon *Harmon Industries v. Browner*, 191 F.3d 894 (8th Cir. 1999) which held that EPA’s right to “overfile” can be barred by the preclusive effect of prior state action resolving the violations through, for example, a consent decree. As such, Respondent implies that the State *has acted* in some way in regard to resolve the violations at issue in this case, which seems inconsistent with its claim here that the State should be given an opportunity, at this point, to act on the violations. The record produced by the parties, to date, does not clearly evidence that the State has acted. In fact, it suggests the contrary, and Respondent has not adequately briefed the facts or law support its *Harmon* argument so as to permit this Tribunal to issue a definitive ruling on this issue at this point. However, it must be noted that the EAB has rejected *Harmon* as binding precedent for cases not within the Eight Circuit (*See, Bil-Dry Corp.*, 9 E.A.D. 575, 2001 EPA App. LEXIS 1 (EAB 2001)) and several federal district court cases have distinguished or even rejected the *res judicata* holdings of *Harmon*. *See e.g., United States v. Murphy Oil USA, Inc.* 143 F. Supp. 1050, 1088-92 (W.D. Wisc. 2001), *United States v. Power Eng’g, Co.*, 125 F. Supp 2d 1050, 1065-67, *aff’d* 303 F.3d 1232 (10th Cir. 2002).

¹³ It is also unclear what benefit, if any, Respondent would incur if the State were given an additional period of time in which to decide to act or, for that matter, what benefit would have accrued to it if EPA’s Section 3008(a) notices had each been far more specific about the

(continued...)

require the doing of a futile act); *Secret v. Brierton*, 584 F.2d 823 (7th Cir. 1978)(same).

V. ORDER

Respondent's Motion for Accelerated Decision, dated February 8, 2006, is hereby **DENIED**.

Susan L. Biro
Chief Administrative Law Judge

Date: March 15, 2006
Washington, D.C.

¹³(...continued)
violations the Agency intended to sue on.